JD(SF)-01-10
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

TREE OF LIFE, INC.

and Case No. 21-CA-38767

GENERAL TRUCK DRIVERS, OFFICE
FOOD AND WAREHOUSE UNION, LOCAL
952, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Winkfield Twyman, Esq. and Isael Hermosillo,
Esq., Los Angeles, CA, for the General Counsel
Thomas P Brown, IV, Esq., Brown Gitt Law Group,
Pasadena, CA, for the Respondent
Gary E. Smith, Organizer, Orange, CA,
for the Union

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Los Angeles, California on October 15, 16 and 21, 2009. The captioned charge was filed on March 19, 2009 by General Truck Drivers, Office, Food and Warehouse Union, Local 952, International Brotherhood of Teamsters (Union), and an amended charge was filed by the Union on May 28, 2009. On July 17, 2009, the Regional Director for Region 21 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Tree of Life, Inc. (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing briefs have been received from Counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a Delaware corporation with a distribution facility located in Los Angeles, California, is engaged in the business of providing specialty food distribution to retailers. In the course and conduct of its business operations the Respondent annually purchases and receives at its Los Angeles, California facility goods valued in excess of $50,000 directly from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (3) of the Act by threatening an employee with reprisals, and thereafter discharging the employee for engaging in union and/or protected concerted activities.

B. Facts

1. The Section 8(a)(1) Allegation: Threat of Discharge

The Respondent maintains a warehouse facility in Los Angeles, California. Its employees at this facility fill orders, which are then transported to retail establishments throughout a multi-state area. The hierarchy of management at the facility is as follows: Ken Phipps, Director of Operation; Mike Sullivan, Human Resources Director; and Orsy Requeno, Production Manager. Chris Mills, is one of several supervisors.

The complaint alleges that the Respondent threatened employee Jose Ortega with discharge for engaging in union and/or concerted protected activity and thereafter discharged him for such activity.

Jose Ortega, an order selector in the Respondent's warehouse, began working for the Respondent in about 2001, and was discharged on March 11, 2009.[1] In January he contacted Union Representative Gary Smith and thereafter Ortega and another employee began distributing union authorization cards among their coworkers during breaks and at lunch.

[1] All dates or time periods herein are within 2009 unless otherwise specified.

The record evidence shows that Ortega had many concerns about warehouse operations, and believed that his immediate supervisor, Chris Mills, was unfair in the manner in which he assigned and/or laid off workers. As a result of these concerns, Ortega began circulating a petition among the employees requesting that Mills, and apparently Director of Operations Phipps, be disciplined or discharged by senior management. The petition was not introduced into evidence and there is no record testimony of the wording of the petition. Nor did Ortega testify that he had even circulated the petition. However the testimony of Mills, and memoranda written by Phipps regarding his conversation with Mills, establishes the extent of Respondent's knowledge or belief regarding Ortega's activities.

Phipps testified that on January 23, Mills, Ortega's immediate supervisor, reported to Phipps that:

> [S]ome of his employees had come to him complaining about Jose Ortega pressuring them to sign a document, and that…they weren't happy about that, and that it was something along the lines that Jose was unhappy about something and [Mills] believed it to be that [Ortega] was unhappy with management and recent layoffs and some changes—we had a lot of changes, and that was the extent of that report.

As a result, it was decided to ask Ortega about his dissatisfaction without mentioning the document.

The record shows that Phipps called Ortega into Sullivan's office on Friday, January 23 and again on Monday, January 26. Ortega, during his attenuated testimony, seems to have combined some of the elements of both meetings and did not differentiate between what was said at each meeting. According to Ortega, Sullivan began the conversation by asking whether certain mis-numbering or mislabeling problems in the warehouse, which had caused difficulties for Ortega and others in filling orders and about which Ortega had previously complained, had been resolved. Then Sullivan asked if Ortega had any problems or concerns regarding his supervisor, Mills. Ortega said that he and other employees were unhappy with the manner in which Mills would simply assign whomever he wanted to fill vacancies, rather than to assign employees through "an open vacancy" process,[2] as had apparently been past practice. Then, according to Ortega, Sullivan accused him of collecting signatures for a letter (infra), and said he had six witnesses. Ortega, during his testimony, agreed that Phipps or Sullivan accused him of harassing his co-workers. Ortega said he was not doing anything "illegal," and asked who the witnesses were. Sullivan declined to answer; and Phipps said that he could not place one worker against another. Sullivan said, "…that they knew who I was." Sullivan, according to Ortega, told him "to stop doing what I was doing and that I could lose my job."

The complaint alleges that this latter statement by Sullivan constituted a threat of discharge in the event Ortega continued engaging in union and/or protected concerted activity. There is no record evidence that at this time the Respondent was aware of Ortega's aforementioned union activity. However, as is shown by the testimony of Mills,

[2] Apparently meaning a bidding process.

Phipps and Sullivan, along with memoranda, *infra*, that Phipps and Sullivan prepared regarding their conversations with Ortega, the Respondent believed Ortega was requesting employees to sign a petition.[3]

The memorandum prepared by Sullivan, states that he and Phipps had a conversation with Ortega on January 23, as follows:

> On January 23, the conversation dealt with rumored unhappiness that Jose [Ortega] had with Chris Mills. Apparently Jose was attempting to raise an interest in having Chris Mills or Ken Phipps reprimanded or terminated.
>
> So, I started the meeting by telling Jose that I had learned that he was unhappy. I told him that I wanted to get to the bottom of his unhappiness. Ken told Jose that he was concerned that there was a problem and it was being ignored.
>
> Jose complained about Chris [Mills] and said that there were multiple problems.

The memorandum then goes on to list eight distinct problems that Ortega raised. Some of the enumerated problems have to do with favoritism by Mills; other problems seem to be directed not toward Mills but toward other employees. The list is as follows:

a. Jose said that he would make recommendations to Chris and that his recommendations would be ignored.
b. Jose said that there were problems with labels. Ken [Phipps] informed Jose that Chris had been sidelined about the numbering in the warehouse, but he would look into the problem and get it resolved.
c. Jose complained about cycle counts and that 2nd shift was pulling inventory without the correct labels.
d. Jose complained that the individual accomplishing RTS was only scanning and never putting items away.
e. Jose complained that he was treated differently than the others, with others being favored.
f. Jose complained that the work assignments being made regarding Enrique Estrada were not to his benefit.
g. Jose complained that Oscar Guerrero assigned to the Supply Center was a form of favoritism.
h. Jose was unhappy with the bin removal and being placed in his work space by Ms. Cano [a co-worker].

According to the memo, "Both Ken Phipps and I [Sullivan] reassured [Ortega] that we would look into the areas that he claimed should be addressed."

[3] The petition was not introduced in evidence, its wording was not recounted or paraphrased by Ortega or anyone else, and there is no indication in the record that any employee signed it. Indeed, Ortega was never asked during the course of his testimony whether he had in fact circulated such a petition, and his testimony indicates that he specifically denied to Phipps and Sullivan that he had done so.

The memorandum by Phipps, entitled "INCIDENT: Requesting associates to sign a petition," states, *inter alia*, as follows:

> On Friday, January 23, 2009, I was informed by receiving supervisor Chris Mills, that he had been approached by six individuals from the dayshift Support (sic) crew that Jose Ortega, a member of the support crew, was attempting to get them to sign a petition against warehouse management concerning recent changes and layoffs. Jose was trying to coerce these individuals to sign his petition. I informed H.R. Manager Mike Sullivan of this information and we called Jose Ortega into Mike's office to find out why he was displeased. We made no mention of the petition activity. Mike asked Jose what was bothering him and Jose expressed concerns…We told Jose we would look into his concerns and get back to him.
>
> On Monday, January 26, 2009, Chris Mills informed me that Jose Ortega had openly displayed displeasure when they refused to sign his petition and Jose told them that they would regret this when they got laid off…We agreed to call Jose into the office and confront him about trying to impose his position onto other associates…I called Jose to Mike's office at approximately 8:00 a.m. and we discussed the situation concerning the petition with Jose. Jose denied any involvement in the situation but Mike Sullivan made it very clear that if Jose was trying to impose his position onto other associates he could be creating a hostile work environment. If this was the case he could be placing his job in jeopardy.

Regarding the January 26 meeting, Phipps testified that he had a responsibility to ensure that the employees were working in a trouble-free environment, but was in no way suggesting to Ortega that he could not circulate a petition if he had done so without pressuring or harassing people.

Sullivan's account of the Monday conversation is as follows:

> On Monday, approximately 8:30 A.M. Ken brought Jose into the office. I told Jose that the reason he was in the office was that we (Ken Phipps) was told that there were six employees that were being requested or harassed to sign a complaint regarding Chris Mills and Ken Phipps. The individuals had indicated that they were being bullied into signing the document.
>
> I told Jose that if he was doing this, it was wrong and the Company would not tolerate this activity. I told Jose that others could come in to my office or Ken Phipps (sic) office and make a complaint, without someone seeking their removal from work. I told Jose that no one came in and complained. They had ample opportunity.
>
> Jose wanted to know their names. I told him no, that it was told in confidence and that the names would not be shared.

> I told him that if he was doing this it was a form of harassment. I asked him if he understood. He answered yes. I told him that moving forward, the slate was clean but the Company would not tolerate his activities he (sic) was doing this. He said he understood. If he was not doing this, then fine, he had nothing to worry about. If he was not, then he should consider our conversation merely a warning. However, I told him that if he was responsible and he persisted, then it could potentially place him in jeopardy and cost him his job. He said he understood.

Mills testified the employees were coming to him "more--to inform me—so that I could react to it." Thus he recalled that one of the six individuals said, "Hey, you know, this is going on. Jose is trying to…get signatures, and that type of thing." Mills did not relate that any of the six employees said anything to him about being harassed by Ortega. Having been shown Sullivan's aforementioned memorandum, Mills was asked by Respondent's counsel whether the memorandum refreshed his recollection that the named employees indicated that they were being "requested," "harassed" and "bullied" into signing the petition. Mills answered that he knew the employees were being "approached" to sign the petition, and that in relating the matter to Phipps he "probably" would have used the words "pressuring or harassing," but would not have said the employees were being bullied or intimidated into signing the petition.[4]

Mills also testified that in February, prior to Ortega's discharge, he reported to Sullivan and Phipps that an employee had advised him "that union activity was stirring up again. That there was word, you know, that the guys were trying to unionize." However, insofar as Mills recalls, this would have been a general conversation with no specific identification of union supporters. According to Mills, he was told by Phipps and/or Sullivan "to just continue to listen and get more information and see if we know anymore that is going on, or how far along they might be."

On February 12, Phipps and Sullivan held a meeting with employees to discuss unions, and, *inter alia*, urged employees not to sign union cards. They told employees that "Tree of Life wants to keep our facilities free of artificially created tensions that could be brought on by an outside, third party's presence." On April 9, the Union filed a representation petition, and at some point thereafter an election was held and the Union was apparently certified as the collective bargaining representative of the Respondent's employees.

2. The Section 8(a)(3) Allegation; Discharge of Jose Ortega

As noted above, Jose Ortega, an order selector in the Respondent's warehouse, began working for the Respondent in 2001 and was discharged on March 11. The circumstances surrounding Ortega's discharge are not in material dispute. Record evidence shows that the Respondent was very sensitive to safety concerns and the Respondent's safety policies required employees to use a safety harness or safety belt when operating warehouse equipment such as forklifts or cherry pickers.

[4] I credit Sullivan and find, therefore, that the floor of the cherry picker was approximately four-and-a-half feet off the warehouse floor, rather than three feet as estimated by Ortega.

A cherry picker is a hydraulically operated mobile lift. The operator/order selector, standing on a pallet placed over the floor of the lift, maneuvers the lift through the warehouse aisles and, elevating himself to the level of the product, sometimes as much as 20 to 25 feet, physically places the selected items on the pallet; then he delivers the loaded pallet to a designated area for further handling.

The employees were well aware of the fact that failure to wear a safety harness or safety belt while operating such machinery at any elevated height constituted grounds for immediate termination, even though other rule infractions warranted lesser discipline in accordance with the Respondent's progressive discipline policy. Ortega, and all other employees who operated such equipment, were required to acknowledge this understanding by signing an appropriate acknowledgement, as follows:

> This memo will serve as a written reminder that all Warehouse Associates must wear a safety harness at all times when operating an order selector. Any Associate found not wearing a safety harness when working at any level[5] on an order selector will be subject to immediate termination. (Original emphasis)
>
> My signature below acknowledges that I have received a copy of this reminder to the Safety Rules of Conduct and I understand that failure to comply with this and all Company established safety rules is ground for immediate termination.

Ortega signed this document on February 27, 2001.[6]

The Respondent's "Safety Rules and Regulations" contains some three pages of safety requirements, including the requirement that "Safety harnesses must be worn while operating an order selector, lift truck, cherry pickers." Under the heading "Violation of the following Safety Rules will result in immediate termination," the Safety Rules and Regulations conclude with a list of five safety violations that warrant such immediate termination, the first one being, "Safety Harnesses must be worn while operating an order selector, lift truck, or cherry picker."

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[5] The terminology "at any level" is subject to interpretation and there is some inconsistency in the testimony of supervisors regarding this. Thus, the record shows that one former production supervisor, Martin Ronquillo, required cherry picker operators to wear a safety harness at all times, even when driving the equipment at ground level when they were only moving the machine to change a battery. Ronquillo testified that some of his employees disagreed, and told him this was unnecessary and "not part of the safety issue." Other supervisors maintained that although it was a good idea to wear a safety harness even at ground level, it was not mandatory for employees to do so and clearly did not warrant automatic termination. However, the record abundantly shows universal agreement, among supervisors, managers and employees, that cherry picker operators who failed to wear a safety harness when elevated above ground level would be terminated.

[6] At this time Ortega was working for essentially the same entity that became the Respondent due to a name change.

On March 5, Ortega was using the cherry picker to stack pallets in the warehouse. Although the pallet on which he was standing was at a height of some three to five feet above the concrete warehouse floor, he was not tied off with a harness or safety belt. Apparently he did not expect anyone to be in that part of the warehouse at that time as he testified, "It is an area that I was at and there is very little times when someone comes through to circulate." Sullivan, who had come to talk with Ortega about something, saw him in this elevated position and asked if he shouldn't be wearing a safety harness. Ortega claims he said yes, but offered as an excuse that "I was just stacking pallets, I was not driving around the warehouse."

On direct examination Ortega was asked his understanding of the safety rule regarding the wearing of a safety harness while operating a cherry picker. He testified that a harness is to be worn "At any time when you use the cherry picker and you're at a height." [7] He knew this "because I have been doing this work for years, and from time-to-time they would show us certain security videos."

Sullivan, HR manager since May, 2007, testified that when employees are operating cherry pickers they must wear a harness when elevated in order to protect both the safety of the employee and the liability of the company in the event of an accident, and that such a policy is well known by the employees and is mandated by the California Occupational Safety and Health Act.[8] Sullivan testified that on March 5, he walked into the warehouse to have a specific conversation with Ortega. He observed that Ortega was elevated in a cherry picker and was not attached to the equipment by a safety harness. Sullivan estimated that the floor of the cherry picker upon which Ortega was standing was chest high to Sullivan, who is five-eleven. Sullivan asked Ortega whether he wasn't supposed to be wearing a safety harness. Ortega replied, "not at that height."[9] Sullivan then left and reported the matter to Ortega's supervisor, Mills. Ortega worked the remainder of his shift that day.

Sullivan testified that he, Phipps, Senior Director Eddie Addis, and Director of Benefits Keith Morrison, who is Sullivan's immediate supervisor located in St. Augustine, Florida, participated in the decision to terminate Ortega. Sullivan testified that he did not become aware that Ortega was engaged in union activity until after Ortega was discharged, when it became known that he had been participating in union meetings.

Phipps, director of operations for the Los Angeles division of the Respondent, is in charge of warehouse and transportation operations for Arizona, California and Nevada. Phipps testified that his immediate supervisor, Senior Director Edward Addis happened to be at the Los Angeles facility on March 5, the day the incident occurred. During a casual discussion about business, Phipps mentioned that "an incident" had

[7] Ortega's understanding of the rule is consistent with the Respondent's requirement and practice that a safety harness must be worn while operating cherry pickers or similar equipment "at a height," that is, while elevated.

[8] See California OSHA Code of Regulations, Title 8, Section 3648: Operating Instructions (Aerial Devices), Subsection (o): "An employee, while in an elevated aerial device, shall be secured to the boom, basket or tub of the aerial device through the use of a safety belt, body belt or body harness equipped with safety strap or lanyard." (Emphasis supplied.)

[9] I credit this testimony of Sullivan.

occurred that day, and told Addis, "We had a guy up in the air without a tether." Ortega's name was not mentioned. Addis said, "That is immediate termination." Both Addis and Phipps investigated the matter.

Phipps testified that he began an investigation, as follows: "[T]he day of the incident, we checked [Ortega's] file. I checked with his immediate supervisor [Mills] in regards to any type of other prior incidents that could have happened similar to this situation, as I was still new with the Company. I wanted to make sure that we were handling things consistently." Mills advised Phipps that Ortega had recently completed a periodic safety-training program and had signed off on training. Phipps also reviewed the aforementioned 2001 document signed by Ortega. Phipps further testified that he (and apparently Sullivan) "counselled with" Keith Morrison, director of benefits and human resources for the Western region, and with Mark Richmond, corporate risk manager, "about company practices in regards to this policy, and we were told that it was nationwide,[10] and again, with me being new, I am learning some of this stuff as far as practices everywhere."

On the next day, February 6, Ortega was called into the office. Phipps asked Ortega how high he was elevated and Ortega said about three feet. Sullivan interjected and said he was looking up at Ortega as he spoke with him and Ortega was elevated more than three feet from the warehouse floor. Phipps asked Ortega whether he was aware that "this is an immediate termination offense." Ortega said yes. Phipps asked him if he recalled being trained recently about this very policy, and Ortega said yes. Phipps asked him if he recalled signing the 2001 document and showed it to Ortega. Ortega said he remembered it and signed it. Then Phipps reviewed the situation and asked Ortega, "why would you do this," and Ortega's response was that he was only performing that particular job of stacking pallets for a short time. Phipps said he was concerned about Ortega's safety and then went on to tell him about a personal situation while working for a different employer, when an employee had fallen off a cherry picker and hit his head and died. Phipps told Ortega that he had committed "a very, very serious infraction," and asked Ortega whether he had anything else to tell him about the incident. Ortega said no. Then Phipps immediately suspended him for three days pending a further review.[11]

On Wednesday, March 11, Ortega was terminated.

[10] In this regard the Respondent introduced the entire personnel files of two individuals who were discharged, with no prior warnings, for not wearing a safety harness: Kenny Haynes, at the Bloomington, Indiana facility on November 17, 2003, and DeAndreus Hinton, at the Milwaukee, Wisconsin facility, on August 27, 2007. There is no contention that these personnel files are not accurate and complete. The Respondent also introduced evidence regarding the discharge of an employee, Frank Herrera, in its Los Angeles warehouse on June 22, 2007. From the documentary evidence introduced, Herrera was ostensibly discharged for "sleeping"; however he had raised himself on the cherry picker, unhooked his harness at an elevation of some 20 feet, stepped off the cherry picker and laid down and fell asleep on merchandise on the shelves. Thus, there was a dual reason for his discharge.

[11] Sullivan testified similarly regarding this conversation with Ortega.

The General Counsel presented evidence attempting to show that employees, other than Ortega, violated the rule with impunity, and that even supervisors would be observed operating equipment without being tied off. Most of this evidence, however, deals with operation of equipment at ground level, which, as noted, is not cause for mandatory discharge and may or may not warrant a verbal admonition depending on the supervisor's interpretation of the rule. This evidence need not be recounted here.[12] Other evidence is more relevant to the instant situation, as follows.

Adalberto Ramirez, a forklift operator, has worked for the Respondent since 1999. Ramirez testified that wearing a safety harness while operating a cherry picker is mandatory; and employees are advised during safety meetings that safety harnesses are also required under OSHA regulations. Further, employees are told that failure to abide by this rule can lead to immediate termination. Ramirez suffered a serious accident on February 20, 2001. He was not wearing a harness when he fell off a cherry picker while at a height of about 5 feet. He hit his head on the concrete floor, suffered a concussion and was off work for seven or eight weeks. After that accident he has always worn a harness because he "learned the hard way." He was not suspended or terminated, although there is no evidence that a mandatory discharge rule was in effect at the time of his accident. Apparently, Ramirez' accident was the catalyst for the rule. Within a week of the accident a memorandum was circulated reminding employees to tie off when elevated in a cherry picker, and, as noted, all employees were required to sign the same aforementioned document that Ortega signed on February 27, 2001, acknowledging that failure to abide by the rule constitutes grounds for immediate termination.

Frank Borba has worked for the Respondent for six years. His supervisor is Orsy Requeno. Borba testified that at some unspecified time he observed another supervisor, Martin Ronquillo, who left Respondent's employee in early January, elevated in a cherry picker at a height of 10 feet or so without a harness.[13] Apparently on one occasion, at some unspecified time, he also saw Production Manager Requeno elevated in a cherry picker some ten feet without a harness.[14] He also saw Requeno on September 11,

[12] The testimony of former employee Christopher Martinez, a custodian, is unclear. On direct examination Martinez testified that he was walking in the warehouse with Ortega and on a number of occasions observed employees in a cherry picker not wearing a safety harness; thus, according to Martinez, Ortega must have observed the same thing, yet did nothing about it. I conclude, from the totality of his testimony, that in fact these employees were not elevated, because if they had been elevated the General Counsel would have presented this evidence through Martinez on direct examination. Moreover, the testimony of Martinez, who was involuntarily terminated, demonstrates that he continues to harbor strong feelings against his supervisors for being discharged; and he was not candid regarding collateral matters, namely having received warnings prior to his discharge. I do not credit Martinez's testimony.

[13] Ronquillo, General Counsel's witness, denied this. I credit Ronquillo, who was no longer working for the Respondent at the time he testified and would have no apparent bias. Further, Ronquillo's testimony establishes that he was very safety oriented, requiring employees to wear safety harnesses even at ground level.

[14] While Requeno was not asked about this alleged incident during the course of his testimony, and therefore did not specifically deny it, there is no showing that even if it did occur any other supervisors or managers were aware of it.

subsequent to Ortega's discharge, on a pallet on a forklift above the shipping office without a safety harness.

Regarding this latter situation, some employee apparently took a video of the incident with a cell phone and the video was introduced into evidence. [15] Requeno testified that it was necessary to move a couch to the mezzanine above certain warehouse offices. The couch, on a pallet, was lifted to the mezzanine level by a forklift. Requeno, who walked up the stairs to the mezzanine, attempted to pull the couch off the forklift but was unable to do so. Therefore, he had to step on the pallet, which may have been partially over the mezzanine floor, in order to push the couch off the forklift. In doing so he was physically over the warehouse floor some ten or twelve feet below without being tied off.[16] Requeno admitted that this was a safety concern and he was not comfortable having to do this. There is no evidence that any other supervisors or managers observed or were made aware of this incident.

Employee Abel Rubakalba testified that on March 23, he observed employee Alejandro Hindjosa elevated in a cherry picker about eight or nine feet, and although Hindjosa was wearing a safety harness it was not tied off to the cherry picker. Upon observing this Rubakalba testified that he 'immediately" went to Production Manager Requeno's office and told Requeno, "up in aisle 80 I just saw Alejandro Hindjosa pulling orders but he's not connected to the cherry picker." Requeno said, "What do you want me to do?" Rubakalba said, "You should write him up or should at least call him on it…" Requeno told him to go and tell Ken Phipps. Rubakalba replied that Requeno was his supervisor and he was telling Requeno. Requeno replied, "Look, Abel, what's happening with you is that you're mad, you're bothered, you're irate because [Phipps] moved you from your position. Because one month before I was working at the cherry picker and [Phipps] moved me to a selector." Rubakalba testified that he did not report the matter to Phipps and never learned whether Requeno did anything about it.

On cross-examination, Rubakalba testified that he reported the matter to Requeno instead of simply reminding Hindjosa to tie off because matters of this nature were supposed to be immediately reported to the supervisor. While Rubakalba agreed that "failure to tie off in this kind of a circumstance could lead to immediate termination," he testified that "if that would have been me they would have gone to tell the supervisor if I'm doing something wrong before coming to tell me."

Requeno testified that he was not at work on March 23, the day Rubakalba maintains this incident occurred. Rather, on this day Requeno was at the hospital attending to a serious medical situation involving his daughter who was injured in a car accident. There is no contrary evidence. Further, Requeno testified that it was not until the day after the alleged incident that Rubakalba told him that Alex Hindjosa had been at elevation without wearing a safety harness. Requeno then called Hindjosa to the office and told him that someone reported he had been at elevation without a harness. Hindjosa emphatically denied it. Requeno believed him because of the manner in which he responded to the accusation. In addition, Requeno disbelieved Rubakalba because

[15] It is very fuzzy and, even after repeated viewing, very difficult to comprehend.
[16] A forklift, unlike a cherry picker, is used to raise products and not people; and there is no way employees who are standing on the forklift pallet can tie off with a harness.

Rubakalba was upset over an unrelated matter and felt threatened that his job might be in jeopardy. I credit Requeno's testimony.

C. Analysis and Conclusions

1. Threat of Discharge

As noted in Phipps' memorandum, Phipps "was informed by receiving supervisor Chris Mills, that he had been approached by six individuals from the dayshift Support (sic) crew that Jose Ortega, a member of the support crew, was attempting to get them to sign a petition against warehouse management concerning recent changes and layoffs." As a result, Phipps and Sullivan first met with Ortega merely to find out what his concerns were regarding Mills and other work-related matters, and to attempt to resolve them; nothing was said about the petition. It was not until the following Monday, after Phipps learned from Mills that "Ortega had openly displayed displeasure when [employees] refused to sign his petition and Jose told them that they would regret this when they got laid off…" that Ortega was confronted "about trying to impose his position onto other associates." When confronted, Ortega "denied any involvement in the situation."

The above scenario indicates that it was the intent of both Sullivan and Phipps to attempt to convey to Ortega that although there was no problem with his circulating the petition, nevertheless employees were complaining about his conduct and therefore he should not harass employees or attempt to impose his position on other employees in the process of requesting that they sign the petition. However, it is clear that neither Phipps nor Sullivan directly told Ortega, in no uncertain terms, that he was not being prohibited from circulating his petition.[17] Rather, according to the foregoing memoranda, the admonition to Ortega was unclear and equivocal. Ortega was not cautioned to be careful about what he told employees while circulating his petition. He was told by Sullivan that employees were being "'requested or harassed' to sign a complaint regarding Chris Mills and Ken Phipps," and that "others could come in to my office or Ken Phipps (sic) office and make a complaint, without someone seeking their removal from work." This would reasonably indicate to Ortega that Sullivan, who did most of the talking at the meeting, was unhappy with the fact that Ortega was simply "requesting" employees to sign his petition against Mills and Phipps. Regardless of Respondent's motive or intent,[18] I find it was reasonable for Ortega to have understood that continuing to circulate the petition could result in his discharge.

[17] Clearly, whether an employee is overstepping permissible boundaries in the exercise of his Section 7 rights is dependent upon the specific circumstances, and is a concept not easily conveyed through generalized admonitions. Complaints by employees about being "harassed" by union supporters are insufficient to preclude permissible union activity. See *Nicolas County Health Care Center, Inc.*, 331 NLRB 970, 983 (2000).

[18] The Respondent's motive for its conduct is not determinative; rather, the test is whether under the circumstances it may reasonably be concluded that the Respondent's conduct interfered with the free exercise of employee rights under the Act. *Post Tension of Nev.,* 352 NLRB 1153 (2008).

The Respondent argues in its brief that there is no showing that either Phipps or Sullivan was aware that Ortega was engaged in concerted activity; indeed, Ortega denied that he was even circulating a petition and there is no showing that any other employees signed the petition. While Phipps and Sullivan had no direct knowledge of such activity, Phipps' memorandum notes that he was told by Mills that "he [Mills] had been approached by six individuals from the dayshift Support (sic) crew that Jose Ortega, a member of the support crew, was attempting to get them to sign a petition against warehouse management concerning recent changes and layoffs." This is sufficient to show that Phipps and Sullivan believed Ortega was engaged in such activity. Clearly, seeking to enlist employees to express dissatisfaction and urge replacement of supervisors because of the manner in which they effectuate changes and layoffs that impact employees, constitutes protected concerted activity. See *The Haytuck Corp., 285 NLRB 904, fn. 3 (1987)*; *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-5 (2007); see generally, *Meyers Industries*, 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Whether or not Ortega was successful in his efforts is not determinative.

Moreover, even assuming *arguendo* that Ortega was not engaged in such activity, nevertheless he was called to the office and admonished that 'if" he was engaged in such activity he was subject to discharge. Thus, Ortega was reasonably led to believe that whether or not he had been engaging in such conduct, any similar type of conduct in the future would not be permitted and could result in his termination.

Accordingly, I find the Respondent has violated Section 8(a)(1) of the Act as alleged.

2. The Discharge of Jose Ortega

The Respondent threatened Ortega with discharge should he continue soliciting his co-workers to sign his petition. Further, the Respondent was generally aware of union activity at the warehouse prior to Ortega's termination. While there is no direct evidence that the Respondent was specifically aware of Ortega's union activity, it may be reasonably inferred, under the circumstances, that the Respondent would suspect Ortega of such union activity because of his circulation of a petition that was critical of supervision and management.

The automatic termination policy for failure to tie off while elevated in a cherry picker had been in effect for an extended period of time. The record shows that the Respondent emphasized the importance of safety, and that all employees, including Ortega, were well aware of the automatic termination policy and were periodically reminded of it. It seems clear that the reason there were only infrequent violations of the rule nationwide, which insofar as the record shows always resulted in termination, is

because the employees were indeed sensitive to the requirement that they be tied off while at elevation. There is no showing that any exceptions had ever been made either before or after Ortega's termination.[19]

Ortega admittedly violated the rule. He offered no viable excuse, and he was suspended and thereafter discharged. There is no evidence that Ortega was discharged for any reason other than his failure to tie off while elevated in the cherry picker.

Accordingly, I shall dismiss this allegation of the complaint.

Conclusions of Law and Recommendations

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a) (1) of the Act as found herein.

The Remedy

Having found the Respondent Tree of Life, Inc., has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER[20]

The Respondent, Tree of Life, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   (a) Warning employees that they are subject to discharge for circulating a petition critical of management.

[19] In this regard, the anomalous, unanticipated situation regarding Requeno's moving the couch from the pallet to the mezzanine without tying off, admittedly a safety concern, is distinguishable because there is no showing that there was any practical alternative; moreover, there is no evidence that this matter had been brought to management's attention.

[20] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining , or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:

(a) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 21 after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Regional Office, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C. January 26, 2010

Gerald A. Wacknov
Administrative Law Judge

[21] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT warn employees that they are subject to discharge for circulating a petition critical of management.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed them by Section 7 of the Act.

TREE OF LIFE, INC.

_____
(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 888 South Figueroa Street, 9th Floor, Los Angeles, CA., 90017-5449, Phone 213-894-5200.